

**IN THE HIGH COURT OF TANZANIA**  
**MUSOMA DISTRICT REGISTRY**  
**AT MUSOMA**  
**CRIMINAL SESSIONS CASE NO. 108 OF 2022**

**REPUBLIC**

**VERSUS**

**MACHOTA s/o MARAKANYI @ MACHOTA**

**JUDGEMENT**

30<sup>th</sup> June & 14 July, 2023

**M. L. KOMBA, J.:**

*'...akaniambia uzuri wewe ni mtoto wa kwetu nimekujua hata ukikimbia nitakukamata tu. Mimi niligueka tena na kumrudia, nikamshika na kumlaza chini nikachukua kisu na kumchinja na kumkandamiza chini hadi alipotulia nikaondoka...'*

There was no eye witness who saw how the deceased was murdered, however, the accused **MACHOTA s/o MARAKANYI @ MACHOTA** was charged with the offence of murder contrary to Section 196 and 197 of the Penal Code, Cap. 16 [R.E. 2019] (Cap 16). It was alleged that on the night of 19th day of November, 2021 at Nyamatoke village within Bunda District in Mara Region, the accused person murdered one **CHAUSIKU MACHABA**. After the information read over and explained to the accused

person in the language he understood, he denied the offence and the plea of not guilty entered against him.

The plea invited a full trial where prosecution marshalled 6 witnesses and 4 exhibits to prove the offence against the accused. It is from Exhibit P2 where there is a narration of what happened. It is cautioned statement. This statement is a statement which is made by accused person as per section 58 and recorded by himself or by the police officer (section 57) of the Criminal Procedure Act, (the CPA). For it to be admissible must be made within four hours from the time when accused was arrested and that accused must freely consented to give his statement. Contents of it must show that accused is confessing to commit the crime.

Story of what happened till Chausiku was diminished is depicted from PW4 who informed the court that during night, the accused was at local pombe shop having a drink where he saw deceased and he did not greet her. After a while deceased decided to leave the place and latter on accused left too. On his way home accused saw deceased around 22:00hrs, deceased asked to know who was that and accused replied. The deceased said you are the son of Msimbe (Malaya). That statement annoyed accused he then decided to punish the deceased.

In the morning the body was found lying in the farm owned by one Thomas and PW4 was among the people who witnessed the body thereafter she raised an alarm which was responded by many people including **PW2 the village chairman** who latter on phoned police and inform them occurrences of the crime. Police officers arrived to the village together with PW1, a Clinical Officer who examined the deceased body and make a finding that cause of death is over bleeding caused by a cut at the neck. He informed this court that the wound was big almost  $\frac{3}{4}$  of the neck was removed. He prepared post mortem report (EXH P1) which explain technically that the death was due to **cardiopulmonary arrest secondary to hypovolaemic shock secondary to severe haemorrhage.**

The body of deceased was found lying under the tree, it was PW6 DC Sgt Bwire draw sketch map of the place where the body was found. He explained during his testimony that they found the body lying on her back, facing upward and there was a cut in her neck. Sketch map which shows where the body was found was admitted as Exh. P4

Deceased was buried in the following day, which is 21/11/2021 and it was PW2 and PW3 who assisted arrest of accused in the same day which is 21/11/2021 while at the mourning.

PW3 informed this court that he was informed over the death of deceased by Wankuru Gariela (daughter of deceased) the morning of 20/11/2021 and later in the afternoon he was informed by Wankuru Machaba (who is PW3 cousin) over the phone that it is the accused who killed the deceased. The deceased was PW3 uncle's daughter and was married to his father (baba mdogo), they are blood related. He arrived at Nyamatoke village in the morning of 21/11/2021 and after burial arrangement he asked to be shown the suspect. He informed the court that the suspect was in mourning with other villagers. With the aid of street chairman (PW2) and two militia men they arrested the accused who was kept at the street office. While under arrest, PW2 interrogated accused who confessed his participation in killing deceased. PW3 was around and heard everything. It was PW2 who called OC-CID for the second time and informed the suspect is arrested. After conversation then OC-CID went to Nyamatoke and took the suspect to Bunda Police Station.

While at police station, suspect was interrogated by PW4, E.4532 DC Sgt Edwin who informed the court that the accused was informed of his accusation and his rights during interrogation and that he was at liberty to call advocate or relatives to witness while interrogation was going on. He did not call advocate nor relatives. He consented to proceed. This witness records by writing what was narrated by the accused and when he finished writing he read the story to accused who found it correct and signed by writing his name and stamp his thumb. That is caution Statement which was admitted in this court as Exh. P2.

During cross examination this witness informed this court that accused know the deceased by the name of Chumchuri Sumuni @ Machaba who is the same person as Chausiku Machaba.

Due to the fact that accused admitted to cause the death of deceased, on 23/11/2013 accused was taken to PW5, Justice of peace. He is a Magistrate and the confession was taken in the office of Justice of peace. PW5 informed the court that he was informed by the accused that he consented to confess before him and that he was not forced by any person. Then Justice of peace record what he was informed by the accused who was from Bunda Police Station when he arrived to PW5. The Extra

Judicial statement which was tendered by this witness admitted as Exh. P3. Accused objected its admission on account that he was tortured while confessing before justice of peace. Trial within a trial was conducted and it was found then the confession was freely made by the accused. In cross examination, this witness stated that when he conducts inquiry to the accused before to know his willingness, he was informed by accused that he was hungry.

After marched six witnesses who tendered four exhibits, prosecution decided to close their case. Upon closing the prosecution case and this court to rule out that the *prima facie* case has been established against the accused, leading by advocate, Mr. Ostack Mligo, the defence side entered his defence.

DW1 (Machota Marakanyi Machota) who was the only defence witness who informed the court that on 20/11/2021 around 08:00hrs he heard an alarm (yowe) which he attended and found the body lying under the mango tree. After sometimes the police officers went to the scene, they gather information relating to deceased and her death and they left with the lover of the deceased. He informed the court in the following day (that is 21/11/2021) while in the preparation for burial he was called by Mr. Issa

(PW3) who was from Serengeti only to be told he was under arrest. Issa and village leader (PW2 and PW3) took him to the village office, where he was told he was involved in the killing of deceased. He submitted that he denied the allegation.

He said police were called and took him to Bunda police station. In the following day he was taken to a room for interrogation and he agree to sign a paper but he was not interrogated and that in the following day he was taken to justice of peace where justice of peace record what he was telling him. He further informed this court that in the first day most people in the village suspected the lover of the deceased to be involved but it was PW3 who said it was him.

During cross examination by Ms. Evangelina, DW1 informed this court that there was information written in the paper he just put his thumb print and his name and that he failed to call his relatives to be his witnesses as they run away from the village. He further confirmed that he was interrogated about the death of Chausiku and that he knows deceased by name of Chausiku. When he was called by street leader before his arrest, he asked PW3 to escort him to village leader as he believes in him and he is his relative.



Having gone through the evidence adduced by both parties, I find the pertinent issue to deal with is whether the prosecutions proved their case beyond reasonable doubt. This being murder case, prosecution must prove the elements of murder which are; **one**, that the person alleged to have been killed is in fact dead; **two**, that the alleged death was unnatural one; **three**, that the accused before this court is the one who killed the deceased; and **four**, that the killing was done with the intention of either causing death or causing serious bodily injury. That is the killing was done with malice aforethought. See **Philimon Jumanne Agala @ J4 vs Republic (Criminal Appeal No. 187 of 2015) [2016] TZCA 278 (22 October 2016)**. It was undisputed by both side, prosecution and defence that deceased Chausiku Machaba died. Exh P1 proved that the death of the deceased was unnatural as was found lying down with a cut wound in her neck. Her death was caused by cardiopulmonary arrest secondary to hypovolaemic shock secondary to severe haemorrhage. In simple words is over bleeding caused by a cut. Therefore, the 1<sup>st</sup> and 2<sup>nd</sup> element of murder is proved. The crucial issue is whether the deceased was murdered by the accused person who is arraigned in court.



In a murder charge, it is also important to prove malice aforethought, for murder entails the killing of a person intentionally. Section 196 of Cap 16 under which the accused person in the present case was charged provides as follows:

*'Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder'.*

That means, it is the duty of the prosecution to prove the case against the accused person; first that it is the accused person who killed the deceased Chausiku Machaba (Chumchuri Sumuni Machaba) and secondly, that he did commit the killings with malice aforethought as stipulated under section 200 of Cap 16.

In his defence accused denied having murdered the deceased and as hinted earlier on, there is no any eye witness who testified to have seen the murderer. The prosecution accusation is based on caution statement, Exh. P2. It is alleged that the accused in his cautioned statement explained how the death of deceased occurred. As testimony of witness revealed, the killing involves persons of the same family (*ukoo*). PW3 is related to

deceased as she was a daughter of his uncle (*mtoto wa mjomba*) and accused confessed that PW3 is his relative.

According to accused, deceased used to call him a son of Msimbe (son of prostitute) this habit annoyed the accused and on material day, at night while accused was from pombe shop on his way home he saw deceased who heard movement and wanted to know who is it. Accused replied and deceased said it is you son of *msimbe*, accused was furious. Part of the accused caution statement read as follows;

*'...aliniuliza kumbe ni wewe mtoto wa Msimbe, mbona nimekuzuia huo mdomo husikii kwanini. Aliniambia utanifanya nini mbona mama alikufa wewe una nini. Mimi ndipo hapo niligeuka nikiwa na hasira nikamshika. Nilimueleza ukipiga kilele nitakuchoma kisu.....nikamuamuru akalie chupa alikalia hadi akanya mimi nilitaka kuondoka aliniambia uzuri wewe ni mtoto wa kwetu nakujua hata ukikimbia nitakukamata tu. Mimi niligeuka tena na kumrudia nikamshika na kumlaza chini nikachukua kisu na kumchinja na kumkandamiza chini hadi alipotulia nikaondoka na chupa ile nikaenda kuitupa chooni na kisu nikamkabidhi dada yangu.'*

The caution Statement of the accused person was admitted by this court after dealing with Mr. Mligos' objection where this court found caution statement was admissible as it met all the requirements under sections 57 and 58 the CPA). Specifically, the following part of the cited section reads;

*'57. (3) A police officer who makes a record of an interview with a person in accordance with subsection (2) shall write, or cause to be written, at the end of the record a form of certificate in accordance with a prescribed form and shall then, unless the person is unable to read—*

*(a) show the record to the person and ask him-*

*(i) to read the record and make any alteration or correction to it he wishes to make and add to it any further statement that he wishes to make;*

*(ii) to sign the certificate set out at the end of the record; and*

*(iii) if the record extends over more than one page, to initial each page that is not signed by him; and.....'*

Caution statement which was admitted by this court shows the accused was warned before starting recording, each page of the caution statement was signed by accused person, it has starting time and finishing time, the

accused himself, being capable to read and write, he signed in the sheet certifying that he understands his statement which was recorded by police officer and found it to be correct. He certified further that he gave information with his free consent. It was the testimony of PW2 that they arrested accused in the village on 21/11/2021 when preparing for burial. Exh. P2 shows that interview by PW4 (the police officer) started at 14:00 hours and completed at 15:20 hours. It is my considered opinion of which I stand to believe that caution statement was recorded basing on the standards as set by law and was freely procured.

The principal in criminal law is that the burden of proof always lied on prosecution shoulders. See **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 CAT

The important issue here is whether this evidence in record has established the offence of murder. As a matter of law, the offence of murder involves unlawful killing of another person (human being) with malice aforethought. Elements of malice aforethought are provided for in section 200 of Cap 16 provides as follows;

*"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-*

*(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person; whether that person is the person actually killed or not; although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*

*(d) .....*

In proving whether or not accused had that intention must be ascertained from various factors, including the following:- (1) the type and size of the **weapon** if any used in the attack; (2) the **amount of force** applied in the assault; (3) the part or **parts of the body** the blows were directed at or inflicted on; (4) The **number of blows**, although one blow may, depending upon the facts of the particular case be sufficient for this purpose; (5) The **kind of injuries** inflicted. (6)

The attacker's utterances if any; made before, during or after the killing and (7) **the conduct of the attacker** before and after the killing. See **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994 (unreported).

The facts of the present case although establishes the weapon used was dangerous and it was just one blow but heavy one as deceased died on the spot, accused utterances before the killing made me to conduct further research. He complained that apart from being called a son of prostitute, deceased said he do nothing as his mother also died. He said as recorded in the caution statement that '*ndipo hapo hapo niligeuka nikiwa na hasira nikamshika....*'

There are some words, which in themselves may appear as innocent, but if are looked at hindsight of what transpires, they are powerful dynamite sufficient to blow off the faculty of reasoning of human minds (see: **Benjanin Mwansi vs. Republic** [1992] TLR 85). In the precedent of **Benjanin Mwansi vs. Republic** (supra), the Court had words to say on issue related to provocation:

*...thus in killing on provocation circumstances which constitute murder are proved and established. But that is not*



*the end. There is something extra and that is sudden provocation, **if we were to be mathematical and devise a formula we would say: killing by provocation is equal to circumstances which constitute murder plus sudden provocation without time for cooling down....***Now, those words in themselves appears very innocent. But if they are looked at with the hindsight of what had transpired, they are a powerful dynamite sufficient to blow off the faculty of reasoning of the appellant. **Did he have time to cool down? No, obviously not** ...We, therefore, find the appellant not guilty of murder but of manslaughter. So, we quash the conviction for murder.’  
(Emphasis supplied).

The thinking of the Court has been appreciated in a parcel of precedents of the Court itself (see: **Republic vs Godfrey Francis Mwesige**, Criminal Sessions Case No. 58 of 2017; **Said Hemed vs. Republic** [1987] TLR 117; **Benjanin Mwansi vs. Republic** [1992] TLR 85; **Shabani Rashid vs. Republic** [1995] TLR 259; and **Damiana Ferdinand Kiula & Charles v. Republic** [1992] TLR 16).

It settled law that provocation as enacted in section 201 of Cap 16 and defined in section 202 (1) of the same code and interpreted in the precedent of **Benjanin Mwansi vs. Republic** (supra) that: it must be a



sudden provocation without time for cooling down. In my considered opinion, in cases where a defence of provocation is produced, the key question is whether: accused had time to cool down? If there is a time to cool the accused then the defence cannot stand. See **Joseph Kamiliango & Five Others v. Republic [1983] TLR 136.**

In the case at hand, what faced DW1(accused) happened to be true because his mother was killed on allegation of love affairs, at that time she was living alone as accused step father was living in another village. Deceased in this case told accused that he is the son of prostitute and that his mother has died what does he have. Immediately after those words accused turned to deceased, uncompromising and cut her neck. According to what was recorded, the attacks were caused by provocation.

Time when the words were uttered and attacks to the deceased is depicted in caution statement (Exh P2). It is revealed that it was immediately as he said '*hapohapo niligeuka nikawa na hasira nikamshika*'. Prosecution managed to tender Exh P2 which help to verify time from when the words were uttered and the action taken. Test of time is confirmed.

In the present case, to cite malice aforethought on the part of the deceased is a tough exercise. The facts of the case show that there was sudden provocation.

What was recorded in caution statement connotes what was testified by DW1 during cross examination that his mother died, his step farther was living in another village and that mean his mother was a living alone and he informed the court that there is no son of prostitute but son of a widow.

I am aware that if admission was freely taken, is the best evidence to be relied upon than any other evidence in criminal charge and does not need corroboration if not repudiated. Accused denied to be interrogated by police claiming he found everything was written but later on he confirmed he was interrogated about the death of Chausiku Machaba. It must be noted that in caution statement the name used is Chumchuri Sumuni @ Machaba while in charge sheet the name of deceased is written Chausiku Machaba. In his defense accused informed this court that he was interrogated about the death of Chausiku and therefore it is my finding that deceased was known with different names, that is Chumchumri and

Chausiku and the sir's name (second name) was the same, Machaba and that accused was actually interrogated.

In his defence accused further informed the court there is no child of *malaya* but child of a widow. It must be noted that accused was drinking pombe from 20:00hrs to 22:00 when he decided to go home and met the deceased and that deceased uttered words which annoyed the accused and there was no time to cool. See **Republic vs. Godfrey Francis Mwesige (*supra*)**.

In the end, I hold that the accused had no time to cool down after the words as uttered by deceased and that the cited words and circumstance of the present case were powerful dynamite sufficient to blow off the faculty of reasoning of the accused.

Having said so, I am moved to convict the accused **MACHOTA S/O MARAKANYI @ MACHOTA** with a lesser offence of manslaughter contrary to section 195 of the Penal Code.


Dated at **Musoma** on **14<sup>th</sup> July, 2023**

  
**M. L. KOMBA**  
**Judge**


### **SENTENCE**

I heard aggravated factors as presented by State Attorney as well as Mitigation as submitted by defense counsel. Statutorily, punishment for the offence of Manslaughter is life imprisonment. In considering the factors as submitted I hereby sentence **MACHOTA S/O MARAKANYI @ MACHOTA** to ten (10) years imprisonment.



  
**M. L. KOMBA**  
**Judge**  
**14<sup>th</sup> July, 2023**

Right of appeal is fully explained.

  
**M. L. KOMBA**  
**Judge**  
**14<sup>th</sup> July, 2023**